

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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1 SALVADOR RICO-RIVAS,

2 Petitioner,

3 Case No. 3:23-cv-00288-MMD-CLB

4 v.

5 ORDER

6 NETHANJAH BREITENBACH, *et al.*,

7 Respondents.

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11 In Salvador Rico-Rivas's 28 U.S.C. § 2254 Habeas Corpus Petition he challenges  
12 his murder conviction, arguing that his trial counsel was ineffective in several ways. (ECF  
13 No. 15.) Respondents move to dismiss the Petition as unexhausted. (ECF No. 34  
14 ("Motion").) Because Rico-Rivas may be able to demonstrate cause and prejudice for any  
15 procedural default under *Martinez v. Ryan*,<sup>1</sup> the Court defers a decision on procedural  
16 default of unexhausted claims to the merits' decision. The Motion is therefore denied.

17 **I. BACKGROUND**

18 In October 2013, in Second Judicial District Court (Washoe County), Nevada, a  
19 jury convicted Rico-Rivas of first-degree murder. (Exh. 66, ECF No. 28-16.)<sup>2</sup> Rico-Rivas  
20 was found guilty of stabbing his wife over 20 times in the early hours of Christmas Day  
21 2011. (Exh. 55, ECF No. 33-5.) The state district court sentenced Rico-Rivas to 20 years  
22 to life in prison. (Exh. 71, ECF No. 33-21.) Judgment of conviction was entered on January  
23 16, 2014. (Pet. Exh. 2, ECF No. 16-2.) The Nevada Supreme Court affirmed Rico-Riva's  
24 conviction in June 2015 and affirmed the denial of his state postconviction petition in May  
25 2023. (Pet. Exh. 7, ECF No. 16-7; Pet. Exh. 19, ECF No. 16-19.)

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27 <sup>1</sup>566 U.S. 1 (2012).

<sup>2</sup>Exhibits referenced in this order are exhibits to Respondents' Motion, and are found at ECF Nos. 25, 27, 29, 30-33, 36. Petitioner's exhibits ("Pet. Exh.") in support of the Petition are found at ECF No. 16.

1 Rico-Rivas dispatched his federal habeas petition for mailing in June 2023. (ECF  
2 No. 8.) The Court granted his Motion for Appointment of Counsel (ECF No. 7), and he  
3 filed an Amended Petition through counsel raising seven claims that his trial counsel was  
4 ineffective in violation of his Sixth and Fourteenth Amendment rights. (ECF No. 15.) He  
5 alleges:

6 Ground One: Trial counsel relied on the wrong legal standard when  
he attempted to withdraw as counsel of record.

7 Ground Two: Trial counsel failed to present key evidence in support  
of his defense theory of self-defense.

8 Ground Three: Trial counsel failed to present a valid defense  
9 because he presented an incoherent theory of self-defense  
unsupported by facts in evidence.

10 Ground Four: Trial counsel failed to challenge the felony murder  
11 charge on the basis that the killing did not happen in perpetration of  
a burglary.

12 Ground Five: Trial counsel failed to challenge the entry underlying  
13 the State's burglary theory.

14 Ground Six: Trial counsel failed to ask for a limiting instruction  
15 clarifying that the Temporary Protection Order ("TPO") violation was  
not an element of the charged offense.

16 Ground Seven: Trial counsel failed to object to the weapon  
17 enhancement or the TPO violation enhancement as unconstitutional  
under the Double Jeopardy Clause.

18 (ECF No. 15 at 13-41.)

19 Respondents now move to dismiss the Petition. (ECF No. 34.)<sup>3</sup> They argue that  
20 part of Ground Two is unexhausted and that all other grounds are completely  
21 unexhausted. Rico-Rivas first argues that Ground Two is entirely exhausted. (ECF No.  
22 41 at 2-4.) He also acknowledges that Grounds One and Three through Seven are  
23 unexhausted and argues that he can overcome the procedural default of those claims  
24 under *Martinez v. Ryan*. 566 U.S. 1 (*Id.* at 4-15.)

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28 <sup>3</sup>Rico-Rivas opposed, and Respondents replied. (ECF No. 41, 42.)

1           **II. MOTION TO DISMISS**

2           A federal court will not grant a state prisoner's petition for habeas relief until the  
3 prisoner has exhausted his available state remedies for all claims raised. See *Rose v.*  
4 *Lundy*, 455 U.S. 509, 522 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state  
5 courts a fair opportunity to act on each of his claims before he presents those claims in a  
6 federal habeas petition. See *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *see also*  
7 *Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the  
8 petitioner has given the highest available state court the opportunity to consider the claim  
9 through direct appeal or state collateral review proceedings. See *Casey v. Moore*, 386  
10 F.3d 896, 916 (9<sup>th</sup> Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9<sup>th</sup> Cir. 1981).

11           A claim is not exhausted unless the petitioner has presented to the state court the  
12 same operative facts and legal theory upon which his federal habeas claim is based. See  
13 *Bland v. California Dept. Of Corrections*, 20 F.3d 1469, 1473 (9<sup>th</sup> Cir. 1994). The  
14 exhaustion requirement is not met when the petitioner presents to the federal court facts  
15 or evidence which place the claim in a significantly different posture than it was in the  
16 state courts, or where different facts are presented at the federal level to support the same  
17 theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9<sup>th</sup> Cir. 1988); *Pappageorge v.*  
18 *Sumner*, 688 F.2d 1294, 1295 (9<sup>th</sup> Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455, 458  
19 (D. Nev. 1984).

20           Respondents argue that part of Ground Two, which is the claim that Rico-Rivas's  
21 trial counsel was ineffective for failing to present key evidence in support of his self-  
22 defense theory, is unexhausted. (ECF No. 34 at 6, ECF No. 15 at 17-21.) They  
23 acknowledge that Rico-Rivas exhausted the claims that counsel failed to call Rico-Rivas  
24 as a witness and failed to present his medical records. But they assert that the claim that  
25 counsel failed to introduce evidence that the victim committed a prior assault and battery  
26 through Rico-Rivas's testimony was not presented to the state appellate court.

1 Rico-Rivas argued in his appeal of the denial of his state postconviction petition that  
2 trial counsel was ineffective in several specific ways, including failing to present his  
3 medical records and failing to have Rico-Rivas testify regarding what happened the night  
4 of the stabbing. (Pet. Exh. 16 at 55-57, 60, ECF No. 16-16.) While Rico-Rivas argues  
5 here that evidence of the victim's prior assault and battery would have supported his self-  
6 defense theory, the Court concludes that this claim presents different operative facts than  
7 the claim raised in state court and fundamentally alters the claim. This portion of Ground  
8 Two is, therefore, unexhausted.

9 Rico-Rivas acknowledges that, with the exception of part of Ground Two as  
10 discussed above, all of the claims he raises are unexhausted and that they now are  
11 technically exhausted because the state courts would find them procedurally barred if he  
12 returned to present them to state court. See *Cooper v. Neven*, 641 F.3d 322, 327 (9<sup>th</sup> Cir.  
13 2011) ("[I]f a claim is unexhausted but state procedural rules would now bar consideration  
14 of the claim, it is technically exhausted but will be procedurally defaulted unless the  
15 petitioner can show cause and prejudice."); see also *Woodford v. Ngo*, 548 U.S. 81, 92  
16 (2006). Rico Rivas argues that he can demonstrate cause and prejudice to overcome the  
17 procedural bars. (ECF No. 41 at 6-15.) Respondents dispute that Rico-Rivas's  
18 postconviction counsel performed deficiently and that he was prejudiced under *Strickland*  
19 v. *Washington*, 466 U.S. 668 (1984). Respondents also dispute that the claims are  
20 substantial under *Martinez*. (ECF No. 42 at 3-4.)

21 The parties now agree that because the question of procedural default is  
22 intertwined with the underlying merits of the claims, full merits briefing may assist the  
23 Court with its determinations, and bests serves judicial efficiency. Therefore, the Court  
24 defers a decision on whether the claims are procedurally defaulted from federal review to  
25 the merits adjudication.

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1           **III. MOTION TO SEAL**

2           Respondents have also filed a motion for leave to file an exhibit under seal. (ECF  
3 No. 24.) A presumption favors public access to judicial filings and documents. See *Nixon*  
4 *v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). A party seeking to seal a  
5 judicial record may overcome the presumption by demonstrating “compelling reasons”  
6 that outweigh the public policies favoring disclosure. *Kamakana v. City and County of*  
7 *Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006) (citations omitted). In general,  
8 “compelling reasons” exist where the records may be used for improper purposes. *Id.* at  
9 1179 (citing *Nixon*, 435 U.S. at 598). Here, Respondents ask to file Rico-Rivas’s  
10 presentence investigation report (“PSI”) under seal because it is confidential under state  
11 law and was sealed in state court. (ECF No. 24.) The Court has reviewed the PSI and  
12 concludes that Respondents have demonstrated compelling reasons to file the PSI under  
13 seal. Accordingly, the Court grants the motion for leave to file under seal, and the PSI will  
14 remain under seal.

15           **IV. CONCLUSION**

16           It is therefore ordered that Respondents’ Motion to Dismiss (ECF No. 34) is denied.

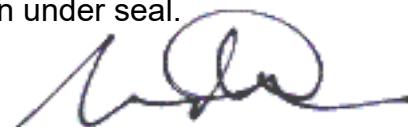
17           It is further ordered that a decision as to whether part of Ground Two as well as  
18 Grounds One and Three through Seven should be dismissed as procedurally barred is  
19 deferred to the merits adjudication.

20           It is further ordered that Respondents have 60 days from the date this order is  
21 entered within which to file an answer to the remaining grounds in the Amended Petition.

22           It is further ordered that Rico-Rivas has 45 days following service of Respondents’  
23 answer in which to file a reply.

24           It is further ordered that Respondents’ Motion for Leave to File Exhibit Under Seal  
25 (ECF No. 24) is granted. The exhibit will remain under seal.

26           DATED THIS 26<sup>th</sup> Day of August 2025.

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MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE